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(1)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Vergie White,
Petitioner

vs.

Pete Geren, Acting Secretary, U.S. Dept of the Air Force,

Respondent

On Petition For A Writ Of Certiorari To United States Courts Of Appeals

For The Ninth Circuit

Petition For Writ Of Certiorari

Vergie White
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661-942-1948

QUESTIONS PRESENTED FOR REVIEW

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PETITION FOR WRIT OF CERTIORIARI

Petitioner, Vergie White, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit appears at Appendix A to the Petition and was not reported.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Civil Rights of 1964

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:

20 Apr 2009, and a copy of the order denying rehearing appears at Appendix 1 ("App 1")

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Vergie White is an African-American female and is a former government employee who began her career in 1974 and retired after 26 years in 2001. Edwards Air Force Base, CA (EAFB), according to AboveTopSecret.com, has been around

> *...for more than 50 years...and has been*
>
> *...an epicenter for revolution in flight*
>
> *and a significant flight-testing facility*

for investigating the critical disciplines of flight.

EAFB is home to the Air Force Flight Test Center (AFFTC)[1] and is the largest employer in the Antelope Valley, which includes cities such as Palmdale and Lancaster. During her employment, she filed an individual EEO complaint alleging discrimination based on race, sex, color, age, and reprisal (EEOC #340-A1-3604A).

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[1] *...test, develop, and evaluate aircraft in the U.S. inventory. The AFFTC is responsible for research and development of the nation's aerospace weapons systems, from design state to operational readiness. Edwards AFB ...approximately 785 military officers and nearly 3,600 enlisted men and women plus some 10,800 civilian employees.*

Petitioner changed her complaint to a class complaint. The Administrative Law Judge (ALJ) ruled against plaintiff without granting discovery. On 3 November 2004, Petitioner filed class action claims in US District Court, Central District of CA, the Honorable Judge Nora Manella presiding.

On 27 Oct 2005, the DC granted Defendant's motion to dismiss. **(App 1)**. On 21 Nov 2005, Petitioner filed an appeal to the 9th Circuit. On 28 Jan 2009, the 9th Circuit affirmed the DC's ruling. **(App 24)**. On 3 March 2009, Petitioner filed a petition for panel rehearing/enbanc. On 20 April 2009, the 9th Circuit denied the petition. **(App 28)**

REASONS FOR GRANTING THE PETITION

Introduction

Question #1: **Are federal agencies required to follow Supreme Court's decision in Adarand?**

According to Wikipedia, strict scrutiny:

...is the most stringent standard of judicial review used by United States courts reviewing federal law. To pass strict scrutiny, the law or policy must satisfy three prongs: First, it must be justified by a compelling governmental interest...

Second, the law or policy must be narrowly tailored to achieve that goal or interest... Finally, the law or policy must be the least restrictive means for achieving that interest... The Court must use strict scrutiny if a)the impact is so 'stark and dramatic' as to be unexplainable on non-racial grounds... (b)the historical background suggests intent; or (c)the legislative and administrative records show intent.

This is in comparison to a rational basis review, which is:

...the lowest level of scrutiny applied by courts deciding constitutional issues... The higher levels are typically referred to as intermediate scrutiny... The rational basis test is the default test for courts deciding questions of law regarding government action. If a government action conflicts with another constitutional value, then judges may turn to a higher level of scrutiny.

Defendant is not following the requirements set forth in *Adarand Constructors, Inc., v Pena*, 115 S.Ct. 2097 (1995) which mandates a strict scrutiny standard. As stated in *Memorandum to General Counsels: Re: Post-Adarand Guidance on Affirmative Action in Federal Gov. 2/29/1996:*

> *Under Adarand, however, the government does have a compelling interest in acting to remedy the identified*

effects of its own discrimination, or of its own practices that unintentionally extend the effects of discrimination by others. City of Richmond v J.A. Croson Co., 488 U.S. at 486 (1989)(plurality opinion)...Race-based remedial action may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of prior discriminatory conduct that has eased. Adarand, 115 S.Ct. at 2133 (Souter, J. dissenting)

However, Defendant has consistently denied that they have been acting in a discriminatory way, and therefore, has not placed any remedial steps to eliminate policies/practices:

While discrimination in federal employment may not now be the pervasive problem it once was, instances of

> *discrimination still persist in federal employment... The President's July 1995 Affirmative Action Review noted that one of the lingering effects of historical practices has been that minorities and women are still underrepresented at higher grade levels. Ibid.*

Even though Defendant has been aware of this class complaint, e-mails have been written by a class and non-class member that works at Edwards AFB, CA, complaining of discriminatory treatment. (**App 30 & 31**). The only way to stop the Defendant is by judicial order:

> *A prior judicial, administrative, or legislative determination of discrimination by the government is not required before the government may*

> *voluntarily choose to use affirmative action efforts. City of Richmond v J.A. Croson Co., 488 U.S. at 486 (1989) 488 U.S. at 500.*

Statistical/non-statistical information show that the Defendant has been discriminating against minorities.

Statistics and Non-statistical Information

The EEOC has required federal agencies:

> *to fill out MD-715. This Management Directive is to ensure ...that all employees and applicants for employment enjoy equality of opportunity in the federal workplace regardless of race, sex, national origin, color... Furthermore ...Section 717 of Title VII requires federal agencies to*

take proactive steps to ensure equal employment opportunity for all their employees and applicants for employment.

This means that agencies must work to proactively prevent potential discrimination before it occurs and establish systems to monitor compliance with Title VII. Agencies must regularly evaluate their employment practices to identify barriers...

The EEOC defines barrier as the following:

An agency policy, principle, practice or condition that limits or tends to limit employment opportunities for members of a particular gender, race or ethnic background... Barriers can result

> *from prejudice, stereotyping, fear, comfort level or customer preference. Many employment barriers are built into the organizational and operational structures of agency, embedded in the day-to-day procedures and practices of the agency.*

The Defendant is the United States Air Force, but a comparison of the other Armed Forces is necessary to determine the extent of Defendant's barriers facing minorities. The following are a sampling of questions from MD-715 that have created barriers:

- *Are management/personnel policies, procedures and practices examined at regular intervals to assess whether there are hidden impediments to the realization of equality of*

opportunity for any group(s) of employees or applicants? 29 CFR Section 1614.102(b)(3)

US Army (Materiel Command) YES

AirForce **NO**

Naval Air Warfare Center Weapons Division YES

Explanation: H-2

- *Have timetables or schedules been established For the agency to review its Merit Program Policy And Procedures for systemic barriers that may be impeding full participation in promotion opportunities by all groups?*

US Army Materiel Command YES

AirForce **NO**

Naval Air Warfare Center Weapons Division YES

- *Have timetables or schedules been established For the agency to review its Employee Development/Training Programs for systemic barriers that may be impeding full*

participation in promotion opportunities by all groups?

US Army Materiel Command	YES
Air Force	**NO**
Naval Air Warfare Center Weapons Division	YES

These barriers have affected minorities. For example, since there are no reviews for Employee Development/Training program, Black males make up 10% of the workforce, but only 2% (GS 5-8) and 6% (GS 9-12) and 0% in GS 13-15 in Career Development Programs.

Black Women make up 10% of the work force, but 0% (GS 5-8) and 0% (GS 9-12). It is similar for other races. (Edwards AFB FY 2004 figures).

Residual Effects With Class Members Due To Barriers By Defendant

Separations. In *Ensuring Employment Equity: Are Federal Diversity Programs Making A Difference?* by Katherine Naff & Edward Kellough, they examined:

> *promotions, discharges, and voluntary quits, using data from OPM's Central Personnel Data File (CPDF), an employment database that includes most civilian federal employees.*

Regarding separations, the authors noticed that:

> *...there is a tendency to discipline African-American employees more harshly than white employees... even controlling for other variables, OPM concluded, 'there is no other known quantitative factor or combination of factors, excluding race that entirely*

accounts for the disparity in discharge rates for African-Americans.'

Air Force Separation Rates

FY 2003-2004 In FY 2003-2004, Black males made up 6.1% of the Air Force, but account for 8.6% of separations. Hispanic Males account for 4.9% of the workforce but 5.5% of involuntary separations. Other races are involved as well. With voluntary separations, Black males and females have the highest rate of all minorities. There is the same pattern for FY 2005.

FY 2005 The Air Force created a barrier by not keeping track of separations:

Currently, we track the type of separation such as retirement, resignation, etc. but not necessarily the reason an employee is leaving the AF workforce. Generally we

have not conducted exit interviews. Without the data, we do not know the reasons that employees are separating.

Naff & Kellough state in their report:

...a decision to quit is strongly influenced by employees' age, education, and level of pay. However, voluntary turnover can also result from dissatisfaction with the job and perceptions of unfairness in decisions regarding work-related outcomes (e.g., promotions). There is evidence that African-Americans are often less satisfied with their jobs than whites and more likely to perceive a lack of fairness.

Air Force Promotions

Naff & Kellough write:

> that *the availability of promotion opportunities for minorities and women within an organization is an important indicator of equity... The dearth of minorities and women in senior federal jobs was seen as evidence of "glass ceiling"... the Merit systems Protection Board (MSPB) found that women are promoted proportionately less than men and non minorities from entry or lower level jobs.*

Looking at the Air Force's FY 2005 GS levels, you can see that the higher the GS rating, the fewer minorities exist (all numbers rounded. "WM = White Male, BM = Black Male, etc.

GS – Air Force

GS	WM	WF	BM	BF	HM	HF	ASM
13	16.6%	8.7%	9.1%	6.0%	10.9%	4.3%	16.8%
6.5% ASF							

GS WM WF BM BF HM HF ASM

14 6.0% 2.5% 2.5% 1.6% 2.8% 1.4% 3.5%

1.6% ASF

GS WM WF BM BF HM HF ASM

15 2.1% 0.9% 0.6% 0.3% .08% .03% 0.6%

.06% ASF

SES WM WF BM BF HM HF ASM

SES 0.4% 0.1% 0.1% 0.0% 0.1% 0.0% 0.4%

0.0% ASF

% Wrk 78.5% 70.2% 9.6% 16.5% 7.5% 7.9% 3.3%

4.10% ASF

Note: "% Work" means percentage of the workforce. In this case Black Males make up 9.6 percent of the workforce, but only 0.6% of GS 15 positions.

The Air Force figures correlate with Edwards AFB's figures:

Administrative – FY 2001

General Schedule (GS) – Edwards AFB

GS WM WF BM BF HM HF ASM

13 58.2% 23.1% 6.6% 2.2% 3.3% 3.3% 0.00%

1.10% ASF

GS WM WF BM BF HM HF ASM

14 53% 41% 0.0% 0.0% 0.0% 0.0% 0.0%

0.0% ASF

General Manager (GM) – Edwards AFB

GM WM WF BM BF HM HF ASM

13 64% 20% 7.0% 0.9% 4.0% 0.9% 0.0%

0.9% ASF

14 61% 35% 0.0% 0.0% 0.0% 0.0% 0.0%

0.0 % ASF

GM WM WF BM BF HM HF ASM

%Wk 64% 15% 2.0% 2.0% 2.0% 0.54% 9.9%

1.9% ASF

With the Air Force FY 2005 figures, the same pattern exists for FY 2003-2004. An analysis was also done for Wage Grade employees (blue collar positions) for FY 2005:

Wage Grade (WG) – Air Force

WG	WM	WF	BM	BF	HM	HF	ASM
13	1.4%	.04%	.06%	0%	.07%	0.0%	1.0%
0.00% ASF							
14	.08%	. 04%	.05%	.03%	.01%.	0%	0%
0.00% ASF							
GM	WM	WF	BM	BF	HM	HF	ASM
15	.03%	0.0%	.01%	0.0%	.01%	.05%	0.02%
0.00% ASF							
%Wrk	79%	70%	9.6%	17%	8%	8%	3%
4% ASF							

This Air Force figure correlates with Edwards AFB's figures:

Wage Grade (WG) – Edwards AFB

WG	WM	WF	BM	BF	HM	HF	ASM
13	64%	20%	7%	10%	4.0%	10%	0%
10% ASF							
WG	WM	WF	BM	BF	HM	HF	ASM
14	61%	35%	0%	0%	0%	0%	0%
0% ASF							
WG	WM	WF	BM	BF	HM	HF	ASM
%Wk	69%	5%	11%	11%	0.5%	0.5%	0.5%

.20% ASF

Wage Leader (WL) – Edwards AFB

WL WM WF BM BF HM HF ASM

11 57% 14% 14% 0.0% 14% 0% 0%

0.00% ASF

12 72% 6% 6% 0.0% 17% 0% 0%

0% ASF

%Wk 70% 5% 11% 11% 0.5% 0.5% 0.5%

.0.2% ASF

Wage Supervisor (WS) – Edwards AFB

Wage Supervisor (WS)

WS WM WF BM BF HM HF ASM

10 64% 20% 7% 10% 4% 10% 0%

10% ASF

WS WM WF BM BF HM HF ASM

12 60.87% 34.78% 0.00% 0.00% 0.00% 0.00% 0.00%

0.00% ASF

WS WM WF BM BF HM HF ASM

%Wk 70% 5% 11% 11% 5% 5% 5%

.2% ASF

With the Air Force FY 2005 figures, the same pattern exists for FY 2003-2004. The Air Force acknowledges the problem:

The most significant issue for Air Force is the number of ...minorities in GS-13 through GS-15 positions, which is reflective of the 'glass ceiling problem.

Air Force Employee Recognition & Rewards

In FY 2005, Black males make up 9.6% of the workforce, but only 7% of awards of 1 -9 hours; 8.5% of awards of 9+ awards; 11.9% of cash awards between $100 - $500; 8.1% of awards of $501 or more; and 7.4% of Quality Step Increases (QSI). Other races face similar in not only FY 2005, but FY 2003/ FY 2004 as well.

Promotions Time In Grade

In FY 2005 minorities are in career ladder positions, but they in comparison to them in the workforce, they appear to wait the longest. For example, Black males make up 9.6% of the

workforce, but 11.2% of blacks have been in the same position for 25 months or longer. Hispanic males make up 7.5% of the workforce, but have been in the same position for 25 months or longer.

Reduction In Force (RIF)

A reduction in force occurs when an Air Force base reduces its civilian workforce. Black males make up 8.6% of the workforce, but account for 19.4% of RIF. Hispanic males make up 4.9% of the workforce, but 13% of RIF. A policy of using RIF's disproportionately affects minorities.

Average Grade & Average Salary Pay Disparity

A document from the Air Force dated 30 September 1901 (should be 2001) shows the average white male in a professional capacity was a GS-12

("12.44") making $65,912. The average Black male, however, was a GS-11 (11.59) making $56,313 for a difference of $9,599. Hispanic Males (12.13) make $61,399 for a difference of $4,513.

The average White female in a professional was a GS-10.87 with a salary of $49,229. The average Black female (10.58) had a salary of $47,590 for a difference of $1,639. The average Hispanic female (10.57) made $46,368, for a difference of $2,861. Pay disparities are similar for other racial groups not only in the Professional categories but also Administrative, Technical and Clerical categories. Blue Collar was not provided.

Acquisition Demonstration Project (AcqDemo)

In *Lewis, et.al. v Mineta, Secretary, Department of Transportation*, EEOC #310-99-

5861X and EEOC Appeal #01A40442, (Sept 28, 2005) Lewis alleges:

> *... the agency was exempted from many of the requirements of Title 5 of the United States Code, Complainant claimed that since that time, the agency has been using its own internal staffing policies to make competitive and noncompetitive selections.*
>
> *Complainant alleged that use of these staffing policies has: (had a discriminatory impact upon African-American employees; and b)have reflected a pattern and practice of discrimination against African-American employees which have resulted in African-American employees being denied fair career advancement.*

AcqDemo is described as the following:

> *Title VI of the Civil Service Reform Act, Title 5 USC 4703, authorizes the Office of Personnel Management (OPM) to conduct demonstration projects that experiment with new and different personnel management concepts....*
>
> *The Civilian Acquisition Workforce Personnel Demonstration Project is designed to provide an encouraging environment that promotes the growth in all employees and to improve the local acquisition managers' ability and authority to manage the acquisition workforce effectively.*

Utilizing AcqDemo created disparate impact among minorities. There were no "safeguards" to determine whether an organization

was complying with federal law regarding affirmative action/equal employment opportunity (EEO) goals:

> *under 5 U.S.C. chapter 47 OPM is permitted to waive civil service laws and regulations to enable an agency ...to conduct demonstration projects...*such as *classification and compensation; assignment, reassignment, or promotion; and providing incentives. However, no waivers of law are permitted in the areas of employee leave, employee benefits, equal employment opportunity, political activity, merit system principles, or other prohibited personnel practices* Pg. 1428.

This was a concern before AcqDemo was even

implemented. In the *Federal Register Volume 64 No. 5 1/8/99,* the Office of Personnel Management (OPM) issued a 60-day public comment regarding AcqDemo that ended 26 May 1988. Two of the concerns centered on Fairness and Leadership/Supervision Factors:

- Fairness. *Thirty-eight commenter's thought favoritism and the 'good ole boy' system would drive the demonstration and lead to inequitable treatment of employees. Several employees said now managers would now determine their pay increases and, ultimately, their retirement annuities. Others said that monetary awards would be given employees who do not challenge authority and are part of a favored clique.* Pg 1428.

- *Leadership/Supervision Factor. Seven commenter's thought this factor did not emphasize safety and health, equal opportunity (EEO), etc. Some asked how employees' movement through the broad bands related to existing affirmative action (AA) goals.* Pg. 1429.

Under AcqDemo, there is wide latitude on the use of pay panels and how they are formed. Each organization at Edwards receives a certain amount of money. The money is controlled by the pay pool panel, which consists of the pay pool manager and the rating officials. The pay pool panel has authority to distribute the money to employees according to the rating received. The pay pool panel has the authority to change the overall rating.

However, the majority of the pay pool managers and pay pool panels are white. Minority ratings can be lowered so the pay pool panel can give the majority of the money to each other. It is possible to have the supervisor be the pay pool manager. It is also possible for the pay pool panel to get higher ratings from the supervisor because the supervisor selects the pay pool panel. The supervisors' ratings, according to the *Federal Register, ...are reviewed by their peers (i.e., by other raters in the same pay pool)...* Pg 1428.

Edwards AFB Personnel Office Created Barriers Against Class

Not Coding In Applicants Correctly: In order to compete for any job position, it is important to be coded in with the correct job title and experience. The Civilian Personnel Office on EAFB uses

Standard Automated Inventory and Referral System (STAIRS) that translates an employee's education and experience.[2] Personnel have not been inputting the information in the system not only for additional education but for any additional experience that an employee obtains.

If you are coded incorrectly with your job title, the system will screen your records and rank your skills incorrectly, preventing the applicant from competing for the position. Many class members have stated that the Personnel Office either inputs their experience incorrectly, place them in the wrong

---

[2] *...variety of codes which capture pertinent information relative to work experience, education, training, performance, etc. Once this record is established... it is automatically updated each time a personnel action is generated...*

job series, or do not put in the experience/education obtained later.

Defense Civilian Personnel Civilian Defense System (DPCDS)

DPCDS links all Armed Forces together (Army, Marines, Air Force, and Army). If an applicant has a prior military and/or civilian experience, his/her name is in DPCDS. It is very easy to look at a person's race because it is in the system. The majority of applicants hired by CPO are white.

Manipulation of Underrepresented Statistics

It is unclear as to whether the Affirmative Employment Plan for the Defendant is accurate. The Defendant is acting as if they have enough minorities in certain positions. For example, the complainant

obtained an EEO list of all employees that work at the Communications Squadron (App 32).

There are minorities that are listed as still employed by the agency. For example, this plaintiff and her husband, Mr Leonard White, Sr. have been retired since 2001, but are still on the list in 2003.

Lack of Applicant Flow Has Affected The Class

In a letter to Carlton Hadden, Director of Federal Operations of the EEOC, the Council of Federal EEO and Civil Rights Executives stated that the EEOC would require:

> *...federal agencies to maintain systems that track applicant flow data. There are many federal agencies that still have not requested approval from the Office of*

Management and Budget for their applicant flow form.

Without this form, agencies cannot determine the effectiveness of their recruitment trips and cannot decide which job fairs are worth going back to and which ones to drop.

The Air Force confirms this by stating:

The U.S. Air Force does not maintain a data set for job applicants. The absence of this data makes it impossible to analyze representation of certain in the workforce.

Race and National Origin (RNO) Data. The requirement to collect RNO applicant data is a particular challenge on applicants and current Federal employees. Currently we can

only capture that data on a voluntary supplemental sheet and not all applicants submit the data. We are waiting for the government-wide form for applicant self-identification that is being worked by the EEOC task force.

It is impossible to have an effective recruitment without having applicant tracking. This greatly affects the class. How do you know if your recruitment efforts are working if there is no method to track applicants?

When submitting the required report to the EEOC, the Defendant 'lumps' all the bases together to make a final report. This report gives the impression that the Air Force is not discriminatory. No individual bases are analyzed. For example, Defendant admits that there are no studies to see if

their policies and practices are discriminatory at EAFB:

> sex, national origin, religion, age & disability.
>
> **Air Force** - The Air Force creates no reports, studies or documents that concern EEO, diversity, affirmative action or the recruiting and hiring of African-Americans at EAFB. Similarly, the Air Force creates no reports, studies or documents that provide statistics on the number and/or percentages of African-American employees at EAFB from October 1, 2000 to present. Any such reports, studies or documents referenced above created by the Air Force report information across the entire Air Force.

Question #2: **Are district and circuit courts required to determine Defendant's outreach to the community to see if diversity is effective?**

The *Memorandum to General Counsels: Re: Post-Adarand Guidance on Affirmative Action in Federal Gov. 2/29/1996* states:

> *There are also areas of governmental activity where, in order to be effective and have the cooperation and confidence of the*

community, an agency must be representative of the community. This form of operational need has been recognized in the law enforcement context by members of the Supreme Court, and by lower courts, and focuses on an agency's ability effectively to address the needs of the communities it serves. See Wygant v Jackson Bd. Of Educ., 476 U.S. at 314 (1986) (Stevens J. dissenting)

Defendant has not examined the population of nearby communities to see if they are representative of the community. The Memo further states:

...if an agency's statistics were to reveal underutilization only in its hiring and promotion of African-Americans, the agency

would be justified in focusing [on] remedial action...

Edwards AFB - Ethnicity and Gender Comparison (Defendant's Interrogatory #3 – PEDD0000356)

Numbers of Employees

2003	2004	2005
3,197	3,023	3,018

White Males/White Females

2003	2004	2005
75%	75%	75%

Black Males/Black Females

2003	2004	2005
10%	10%	10%

Using LA Almanac.com, however, shows the 1990 Census and 2000 Census:

Lancaster	1990	2000
White Males/White Females	73.03%	52.44%
Black Males/ Black Females	7.43%	16.01%
Palmdale	1990	2000
White Males/White Females	66.98%	41.00%

	1990	2000
Black Males/ Black Females	6.41%	14.50%

As white males/females are declining, they are still represented well on EAFB. Other races, however, have increased, but minorities are not represented on EAFB. Using the Census to determine the demographics of the surrounding communities is okay to use as stated by *NAACP v City of Bayonne, New Jersey,* #96-5848 (3rd Circuit, 1998):

> *While defining the relevant labor market precisely is usually necessary, we can also look to the general population of the Bayonne area if it is an adequate proxy. See Wards Cove Packing Co., Inc. v Atonio* (sic), 490 U.S. at 651 n.6, 109 S.Ct at 2121 n. 6, (1989) (citations omitted)("[W]*here 'figures for the general population might*

> *...accurately reflect the pool of qualified job applicants,; we have even permitted plaintiffs to rest their prima facie cases on such statistics*, 104 L.Ed.2d 733

Question #3: Does an error of law affect class members' 5th amendment rights?

The DC made errors of law that affected class members. These errors are an abuse of discretion that was never fully examined by the appeals court. *Coca-Cola Company v Tropicana Products Inc.*, 690 F.2d 312 (2nd Cir. 1982) explains further:

> *An abuse of discretion may consist of an error of law, an error of fact, or an error in the substance or form of the trial court's order. For example, the trial judge may have an erroneous view of the law which controls the pending suit-a statute,*

> *standard or line of cases may be misapprehended or the judge may have misapplied the rules governing the issuance of injunctive relief. The Supreme Court has viewed an error of law as an abuse of a trial court's discretion. United States v Corrick, 298 U.S. 435, 438, 56 S.Ct. 829, 830, 80 L.Ed. 1263 (1936).*

In its Order, the 9th Circuit stated:

> *The district court properly dismissed White's Title VII claim because White did not fully exhaust her administrative remedies.* pg 2

The DC stated by going to federal court instead of the EEOC caused Plaintiff to not exhaust her administrative remedies:

> *...there was no conclusion of administrative proceedings—and thus no final action – as to Plaintiff's individual claims, because she never pursued them through the administrative process.* (Pg 2 of DC's order).

Petitioner tried explaining to both courts the differences between the EEOC and federal court procedures. With the EEOC, the moment an individual complaint changes into a class complaint, the individual complaint becomes a class complaint. There is no individual and class complaint as long as there is a class complaint.[3]

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[3] *An individual complaint that is filed before or after the class complaint is filed and that comes within the definition of the class claim(s), will not be dismissed but will be subsumed within the class complaint. If the class complaint is dismissed at the certification stage, the individual complaint may still proceed,*

With federal court, however, there is **both** an individual and class complaint. Petitioner was not aware of this, and this showed when Defendant stated that Petitioner never mentioned her individual claims (*the amended complaint does not specify what relief White seeks as to her individual claims.* 'Memorandum of Points and Authorities', (pg 5) Petitioner thought that her class claims were her individual claims. The Federal Rules of Civil Procedure does not indicate the difference, and Petitioner was using language under EEOC court

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unless the same or another basis for dismissal applies. (Memorandum Directive Chapter 8, Complaints of Class Discrimination III. C.) The word "subsume" means "to bring or include under."

procedures. The DC claims Petitioner waived her rights:

the class agent is stating for the record that her case will ***not*** *proceed to a hearing as an individual... The class complaint will be vigorously appealed. ...Consistent with her statement of intent, she failed to submit any letter indicating an intent to pursue her individual claims. Through her own statement, and her inaction, Plaintiff effectively waived her right to pursue her individual claims in federal court.* Pg 6.

However, the ALJ gave Petitioner two choices: appeal his decision on the class complaint or proceed to a hearing on the individual complaint. Petitioner wrote the EEOC that her case would not proceed to a hearing as an individual. *Munoz v Aldridge,*

Secretary of the U.S. 894 F.2d 1489 (5th Cir) 1990 states:

> *[T]he purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer. Good faith effort by the employee to cooperate with the agency and EEOC and to provide all relevant, available information is all that exhaustion requires. Ibid., quoting Wade v Secretary of the Army, 796 F.2d 1369, 1377 (11th Cir. 1986)(relying on Johnson v Bergland, supra)(emphasis supplied) Ibid.*

Martinez v Dept of The U.S. Army #02-50765 (5th Cir 2002) states:

> *The purpose of exhaustion is to give the agency the information it needs*

to investigate and resolve the dispute between the employee and the employer.

'Good faith effort by the employee to cooperate with the agency and EEOC and to provide all relevant, available information is all that exhaustion requires Id (emphasis in original, citations omitted); accord Randel (v United States Dept. of the Navy), 157 F.3d at 397 (5th Cir. 1998)) (*some cases suggest ...that we should look to whether the claimant made a good faith effort to cooperate with the administrative agency). Munoz states that abandonment does not constitute a lack of cooperation giving rise to a failure to exhaust*

Once Petitioner received the Final Order from Defendant (App 35), she was free to file in DC as stated on page 3:

> *If the complainant wishes to file a civil action, pursuant to 29 C.F.R. Section 1614.407, the complainant may be authorized under Title VII, ADEA, or the Rehabilitation Act to file such action in an appropriate United States District: (a) within 90 days of receipt of the final action on an individual or class complaint if no appeal to [to the Commission] has been filed;...*

Once Plaintiff received the final decision, she had the right to sue in federal court. To say that Plaintiff abandoned her claims without accepting Plaintiff's explanation was not construing Plaintiff's

words liberally. Once Plaintiff received the final decision, she had the right to pursue her individual and class claims in federal court per regulation.[4]

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[4] EEOC's *Federal EEO Complaint Processing Procedures* states:*The AJ* (Administrative Law Judge) *transmits his or her decision to accept or dismiss a class complaint to the class agent and the agency. The agency must then take final action by issuing a final order within 40 days of receipt of the AJ's decision...*

In addition, a dismissal must inform the class agent of the right to appeal to EEOC's OFO (Office of Federal Operations) *or to file a civil action in federal court. Prior to a request for a hearing, in lieu of accepting a complaint for investigation, an agency may dismiss an entire complaint for any of the following reasons ...(4)filing a complaint which is the basis of a pending civil action, or which was the basis of a civil action already decided by a court...* 29 CFR Section 1614.107.

Question #4. There is no precedence as to what happens to EEO individual claims when class claims are in federal court.

The DC implied that Plaintiff had to give EEOC notice before proceeding to federal court, but that is not correct according to *Ray v Nimmo, Administrator, U.S. Veterans Admin.* 704 F.2d 1480 (11th Cir. 1983) states:

> *Thus, a plaintiff need not file such a notice [to the EEOC] prior to proceeding to federal court when the plaintiff has already proceeded through the EEOC complaint process.*

There is no precedence of what happens to an EEO individual complaint when there are **federal** class claims. In *Howard v Evans,* EEOC #570-2006-00176X (April 25, 2006), the agency:

> *...filed an opposition, arguing that an Administrative Judge does not have the authority to dismiss or hold a case in abeyance* [when there are class claims in federal court] *under existing Commission precedent or the regulations or the regulations at 29 C.F.R. Section 1614. Complainant did not file any response.*

Howard did not file any response, but Judge Kravetz placed them in abeyance and stated:

> *...that individual cases subsumed in administrative class complaint should be held in abeyance pending a decision on certification... EEOC MD-110 does not authorize the Commission to hold in abeyance cases when class complaints are filed in Federal District Court. I note that the EEOC*

MD-110 is silent on this question, and it does not expressly preclude holding such cases in abeyance either.

Individual Claims Were Under 'Pattern Or Practice Claim'

The Defendant stated that Plaintiff's individual claims should have been exhausted before proceeding to federal court. The DC agreed with Defendant and dismissed individual claims because they were not exhausted administratively. However, under *Monreal v Potter*, #02-1195 (10th Cir. 2004) that same similar argument was rejected:

Individual claims, the USPS argues, must have been presented separately to the USPS in individual complaints and exhausted before they could be presented in a civil action... Thus, if no class-wide discrimination

is found, this section instructs that any individual complaint by a class agent subsumed within the class complaint be processed under the section dealing with individual complaints.

In this case, however, the individual complaints were never so processed because the agency did not make a finding that there had been no class wide discrimination.

Plaintiffs should not be prejudiced by the agency's particular disposition of the class proceeding which, in any event, by its dismissal of the proceeding effectively exhausted the subsumed individual agent claims as well...

Plaintiffs clearly made claims of individual discrimination within the class

complaint, as indeed they were required to do in order to demonstrate their qualification to serve as class representatives...

Requiring class agents to file both a class complaint and separate individual complaints would be a waste of time when all allegations can be presented together in a class complaint. Further, requiring separate exhaustion of the class allegations and the class agent's individual allegations that form the basis of the class allegations could create conflicting deadlines...

We conclude that individual allegations of discrimination can be exhausted through a class administrative complaint and accordingly reverse... Although the EEOC regulations do address individual and class

complaints in separate actions, see 29 C.F.R. Section 1614.106(1997)("Individual complaints"); id. Section 1614.204 ("Class Complaints"), we find they do not mandate exclusive presentation of individual claims of discrimination in individual complaints...

We find that, as 'agent[s]who ha[ve] filed a class complaint,' Plaintiffs were permitted to assert their individual claims in this civil action.

Error #2 – Not Appointing Counsel For The Class

The 9th Circuit stated in its Order:

The district court properly dismissed White's class action claims because White, proceeding pro se, was not an adequate class representative. Pg. 2.

Petitioner requested the DC appoint counsel for the class, but the DC stated that ... *because this case was filed over a year ago, giving Plaintiff more than enough time to secure counsel, the court finds that granting a continuance would be futile.* Pg. 11.

However, the DC ignored Plaintiff's explanation in which she stated that she was unaware of having a need for an attorney. When this case was before the EEOC, Plaintiff was allowed to represent the class without an attorney. Plaintiff was unaware of the need for an attorney until Defendant filed a motion to dismiss on 29 July 2005 and used case law, which is not in FRCP.

Petitioner began efforts to obtain counsel, but received news around this time that she had cancer. Additionally, severe back pain that occurred when she was working worsened upon retirement.

Plaintiff presented medical notices to the DC, which was ignored. **(App 45 & 46)**

Standard Request For Appointment of Counsel Was Not Analyzed

The 9th Circuit erred by not determining whether the DC used any analysis determine appointment of as stated *Marshall v Wouldridge*, 958 F.2d 368 (4th Cir. 1992)

> *The district court's decision to appoint counsel to a pro se litigant pursuant to 42 U.S.C. Section 1915(d) is discretionary. The court's refusal to appoint counsel may be an abuse of discretion only in exceptional circumstances. See Whisenant v Yuam,* 739 F.2d 160, 163 (4th Cir. 1984); *Cook v Bounds, 518 F.2d 779(4th Cir. 1975)*

> *The question of whether exceptional circumstances exist in any particular case hinges on characteristics of the claim and the litigant. Where it is apparent that the pro se litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him. Whisenant,* 739 F.2d at 163.

Vera v Utah Department of Human Services #02-4112 (10th Circuit, 2003) states that the litigant does not have to be destitute:

> *This court explained that Title VII provides for the discretionary appointment of counsel and that "a litigant need not be destitute to qualify for appointed counsel." Vera v. Utah Dep't of Human Servs., 203 F.3d 836, 2000 WL 130717, at **1-2 (10th*

Cir. Feb. 4, 2000) (unpublished) (quoting Castner, 979 F.2d at 1421-22).

Instead, we explained, the district court should consider the four factors identified in Castner to determine whether appointment of counsel is appropriate. Those factors include (1) plaintiff's financial inability to afford counsel; (2) plaintiff's diligence in attempting to secure counsel; (3) the merits of the allegations of discrimination; and (4) only in close cases as an aid in exercising judicial discretion, the "plaintiff's capacity to present the case without counsel." Castner, 979 F.2d at 1421

As stated in *Koch v US Navy Public Works* #91-55321(9th Cir. 1992) the:

9th Circuit's rules vary. In employment discrimination cases, the district court may appoint counsel 'in such circumstances as the court may deem just.' Bradshaw v Zoological Soc'y of San Diego 662 F.2d 1301, 1318,9 (9th Cir 1987) The district court must consider 1)the plaintiff's financial resources; 2) the efforts made by plaintiff to secure counsel; and 3)whether the plaintiff's claim has merit. Id at 1318 (citations omitted)see also Aldable v Aldabe 616 F.2d 1089, 1093 (9th Cir 1983) (under 28 U.S.C. Section 1915 (d), the district court may appoint counsel only 'if exceptional circumstances' exist)

This is a class complaint and Petitioner does not have the financial resources for the class complaint; has made an effort to obtain counsel, and claims

have merit due to Defendant's policies/practices having an adverse impact on minorities. The Court should have done an analysis to see whether an appointment of counsel is warranted instead of summarily dismissing the case.

To deny counsel to a civil rights litigant is prejudicial according to *Bradshaw v Zoological Society of San Diego,* 662 F.2d 1301 (9th Cir. 1981)

> *The refusal to appoint an attorney is clearly 'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' Cohen v Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (69 S.Ct. 1221, 1226, 93 L.Ed. 1528)... (1949).*

Obviously, the refusal to appoint an attorney is collateral to the merits of the case. The decision to deny the assistance of an appointed attorney to a laymen unschooled in the law in an area as complicated as the civil rights field is truly too important to be deferred until a resolution on the merits can be had.

There is a superficial similarity between the injury that occurs when a civil rights plaintiff is erroneously compelled to proceed through a trial without counsel and the possible prejudice that may or may not occur... However, it is not difficult to imagine—indeed, it is impossible to ignore the irreparable injury that would result from a refusal to review an order denying a civil rights litigant appointed counsel...

Denial of counsel to civil rights litigants who are are entitled to representation under the statute is inherently prejudicial... Were civil rights litigants thought to be capable to handling complex litigation properly at trial, or on appeal, Congress would have thought it necessary to provide for appointment of counsel in the first place.

When Plaintiffs are erroneously denied the assistance of an appointed attorney, the policy of judicial economy is clearly served by permitting an appeal from the order denying plaintiff's motion... the alternative of denying review would only assure that justice will be delayed, or more likely denied, and guarantee that the resources of the court and the parties would be senseless dissipated in the process.

> ***Affirmance of the district court's denial of appointed counsel may well cause such plaintiffs to abandon their case rather than proceed to trial in a obviously hopeless cause.*** (Emphasis is Petitioner's)

Question #5: When a circuit court affirms district court's decision without review, does a lack of review affect class members' 5th amendment rights?

Bourdon v Loughren, 386 F.3d 88, (2d Cir. 2004) states the importance of right of access to the courts:

> [*The well-established] 'right of access to the courts applies beyond criminal litigation to ensure that all citizens have '[t]he right to sue and defend in the courts.' Bourdon citing Chambers v Baltimore & Ohio RR Co. 207 U.S. 142 (1907)*

Petitioner contends that the 9th Circuit did not review other than affirming the DC's decision. The decision by the DC to not appoint counsel and 9th Circuit's affirmation affected the class by when their claims were dismissed. Petitioner believes that due to its size, the 9th Circuit did not render justice effectively:

> *Speaking to the Alaska Bar Association Friday... Associate Justice Samuel Alito Jr. said he supports a split, for practical and political reasons.*
>
> *The current 9th Circuit is simply too big, he said. It now covers 71 million people, the largest of any of the circuits. Alito says the workload was just too high...*
>
> *Each judge has to decide 500 cases a year, which Alito said was 'far beyond the*

capacity of a human being. The case load of judges of the 9th Circuit is absolutely crushing – I don't know how they can possibly do it," he said. 'Due To Its Size, 9th Circuit May Not Be Able To Function Effectively In Rendering Justice', by JuneauEmpire.com

This is clear in a study by Kevin Clermont & Stewart Schwab's *Employment Discrimination Plaintiffs In Federal Court: From Bad To Worse. Harvard Law & Policy Review:*

Our concluding view [states that] federal courts disfavor employment discrimination plaintiffs... Those cases proceed and terminate less favorably for plaintiffs than other kinds of cases...

> *Plaintiffs who appeal their losses or face appeal of their victories again fare remarkably poorly in circuit courts. The fear of judicial bias at both the lower and the appellate court levels may be discouraging potential employment discrimination plaintiffs from seeking relief in the federal courts. Pg. 5*

As stated in *Lilley v BTM Corporation*, 958 F.2d 746, (6th Cir. 1991),

> *The charge of judicial bias is a serious one indeed. The ability of the judiciary to fulfill its constitutional function rests upon the maintenance of impartiality.*

In its decision, the 9th Circuit assumed that the DC applied the applicable laws without examining to see if error was made as stated in *Coca-Cola*

Company v Tropicana Products Inc., 690 F.2d 312 (2nd Cir. 1982)

> *An appellate court discharges its statutory obligation to review when it independently examines the relevant factor considered by the trial court in reaching its conclusion. See In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954).*
>
> *The appellate court presupposes that the trial judge understood and applied the applicable law and took into account all the circumstances of the case. Reversal is warranted only upon a firm conviction that such presupposition was, in a given case, misplaced.*

Question #6: If a Plaintiff files a complaint that is similar to a case pending in Supreme Court, is the district court allowed to dismiss it?

The DC stated in its Order (pg. 3):

> *Plaintiff alleges violations of 5 U.S.C. Section 2301(b)(1)('Merit Systems Principles') and 5 U.S.C. Section 2302(b)('Prohibited Personnel Practices'). Both are part of the Civil service Reform Act ('CSRA')... No private right of action is provided by the CSRA...*

It was premature to state that CSRA does not provide an implied private right of action. On 5 December 2005, the Supreme Court heard oral arguments in *Whitman v Department of Transportation, No. 04-1131:*

The case presents the question whether the Civil Service Reform Act (CSRA), which establishes administrative procedures for resolving employee complaints, precludes federal employees from going into federal court to obtain equitable relief for certain employment-related constitutional and statutory violations.

The district court dismissed Whitman's claims for lack of subject matter jurisdiction, and the Ninth Circuit affirmed, holding that the CSRA's scheme precludes employees from seeking relief in federal court for employment-related claims...

On 5 June 2006, the Supreme Court remanded the case back to the 9th Circuit with instructions, but

it is not still clear whether a private cause of action can be used, for the Supreme Court stated:

> *The Court of Appeals did not decide whether the petitioner's allegations state a 'prohibited personnel practice' The proper course, then, is to remand for the Court of Appeals to address the matter...*

Question 7: There is a private cause of action for failure to implement an affirmative action plan.

The DC stated in its Order:

> *While violations of an affirmative action plan or other regulation may constitute evidence of discrimination in certain cases, such violations do not in and of themselves give rise to private causes of action...* pg. 9

Cort factors should be used as stated by *Borough of Ridgefield v New York Susquehanna & Western Railroad*, 810 F.2d 57 (3rd Cir. 1987):

> *The Supreme Court in Cort v Ash specified several factors that are relevant to the issue of whether a statute provides an implicit private right of action... As the district court have recognized, however, later Supreme Court decisions have pinpointed legislative intent as the key inquiry. See, e.g. Merrill Lynch, Pierce, Fenner, & Smith v Curran, 456 U.S. 353, 377-78, 102 S.Ct. 1825, 1838-39, 72 L.Ed.2d 182 (1982); Middlesex County Sewerage Auth. V National Sea Clammers Ass'n, 453 U.S. 1, 13, 101 S.Ct 2615, 2622, 69 L.Ed.2d 435 (1981).*

The four Cort factors are to be used to discern Congress' intent. See Texas Industries, Inc., v Radcliff Materials, Inc., 451 U.S. 630, 639, 101 S.Ct. 2061, 2066, 68 L.Ed.2d 500 (1981). And as this court has explained in United States v FMC Corp., 717 F.2d 775, 781 (1983), if the first two Cort factors fail to indicate an implied right of action, the last two cannot by themselves establish such a right.

Examining The Cort Factors

1)Is the plaintiff one of the class for whose especial benefit the statute was enacted? Petitioner belongs to a class of minorities affected by the practices/policies discussed earlier.

2)is there an indication of legislative intent to provide or deny such a remedy? The Civil Rights Act

dealt with unlawful employment practices, which is stated by *King v Jackson, Secretary of Housing & Urban Dev*, #06-5149 (U.S.D.C. 2007)

> *Entitled 'Unlawful employment practices,' section e-2 describes numerous actions qualifying for that label, such as firing or refusing to hire an individual 'because of such individual's race, color,... 42 U.S.C. Section 2000e-2(a)(1). Section e-3, entitled 'Other unlawful employment practices,' lists additional employer actions that qualify.*

In *Page v Bolger*, Postmaster General. 645 F.2d 227 (4th Cir. 1981), Butzner, Circuit Judge, dissenting, implied that there is a cause of action with affirmative employment:

> *In compliance with the mandate of Section 717, the Civil Service Commission*

promulgated regulations in 1972 which require the head of each government agency... to establish, maintain, and carry out a 'continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the ...advancement...of employees.

A specific directive of the regulations provides that the agency shall '(c)onduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions...

To not establish, maintain, and carry out an affirmative employment program as a federal agency

is an unlawful employment practice. Earlier in this brief, Petitioner mentioned how Defendant uses affirmative employment to discriminate. In *Parker v. Baltimore & Ohio Railroad*, 652 F.2d 1012, (D.C. Cir. 1981):

> *...the plaintiff contended that his employer's affirmative plan amounted to unlawful discrimination in hiring – a characterization that, if correct,* ***would have placed the employer's conduct squarely within the definition of an unlawful employment practice.***
>
> *See 42 U.S.C. Section 2000-e-29a)(1)(****making it an unlawful employment practice to 'refuse to hire... any individual... because of such individual's race)****... Elsewhere in the opinion, we described the ambiguities in*

the case law, explaining that 'the law of affirmative action under Title VII' was in an unsettled state.' Id. At 1020. (Emphasis is Petitioner)

3)is an implied right of action consistent with the underlying purposes of the legislative scheme? It is important to look at legislative history with Congress as stated by *Federal Civilian Employment Affirmative Action:*

> *In 1969, President Nixon issued an executive order that required the Federal agencies to establish Federal Affirmative Employment Programs to foster equal employment opportunity for minorities and women. These programs have had a statutory basis since 1972.*

> *Since 1978, the... EEOC has had advisory authority or these affirmative employment functions, including the responsibility to review and approve annual equal opportunity plans submitted by each agency... It has no broad enforcement authority, and cannot require agencies to change their mode of operation.*

4) is the cause of action one traditionally relegated to state law, thus making a federal implied right inappropriate? This is not relegated to state law. Implementing a plan falls under the federal government.

Question 8: Is there a private cause of when federal agency does not adhere to its own regulations (AFFTC Instruction 36-6, Air Force Reg 40-713,

Uniform Guidelines On Employee Selection Proced Section 1607.3)?

In *Page,* it states:

> *In United States v Caceres, 440 U.S. 741 99 S.T 1465, 1470, 59 L.Ed.2d 733 (1979)..., the Court said, 'A court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law.'*
>
> *This principle is applicable to Page's claim. The equal protection component of the fifth amendment's due process clause bars federal agencies from discriminating against their employees because of race Congress implemented this constitutional provision by enacting the Equal Opportunity Act of 1972...*

The lineage of the [Personnel] Handbook can traced from Section 717 of Title VII...

It is also true that the regulation is procedural, but this affords no justification for refusing to afford Page its protection in his effort to attain promotion. Procedural rights are not second class rights. Their enforcement is essential to the preservation of substantive rights. Anti-Fascist Committee v McGrath, 341 U.S. 123, 149-74, 71 s.T. 624, 636-50,95 L.Ed. 817 (1951)(Franfurter, J., concurring)

Conclusion

There should be a cause of action when federal government does not adhere to its own regulations. What good are regulations if they are not followed? The federal government is supposed to be an example for corporations to follow.

The petition for a writ of certiorari should be granted.

Date: 24July09

Respectfully Submitted,

Vergie H. White

Vergie H. White
Class Agent Representative

ENTERED
DISTRICT COURT

OCT 2 8,2005

CENTRAL DISTRtCT OF CALIFOFHWA
DEPUTY

FILED
CLERK, U.S. UIZTRICT COURT

OCT 27,2005

CENTRALDISTRICT OF CALIFORNIA
DEPUTY

VERGIE H. WHITE,

Plaintiff,

v.

JAMES G. ROCHE,,
Secretary,

US Dept of Air Force,
Defendant

CASE NO. CV 04-9364-NM (Mcx)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

I. INTRODUCTION

On November 3, 2004, Vergie White ("Plaintiff"), appearing pro se, filed this action against James G. Roche, Secretary, US Department of Air Force ("Defendant"). On May 20, 2005, the court granted Defendant's motion for a more definite statement, and on June 9, 2005, Plaintiff filed an amended complaint ("Complaint") alleging class-action claims for race discrimination in violation of (1) 42 U.S.C. § 1981; (2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.); (3) California's Fair Housing and Employment Act ("FEHA") (Gov. Code § 12940 et. seq.); (4) Air Force Flight Test Center ("AFFTC") Instruction 36-6, Air Force Regulation 40-713; (5) 5 U.S.C. § 2301(b)(1); (6) 5 U.S.C. § 2302(b); and (7) Uniform Guidelines on Employee Selection Procedures § 1607.3. The Complaint also alleged individual claims "similar" to the class claims. Comp. at 14,[1]11. Before the court is Defendant's Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, or Alternatively, to Strike the Class Action Claims. For the following reasons,

Defendant's motion to dismiss is GRANTED.

II. FACTS'

In May 2001, Plaintiff retired from her employment as an Administrative Support Assistant (Contracts) with the Air Force at Edwards Air Force Base ("Edwards"). Compl. at 14, 3. At an unspecified date after her retirement, Plaintiff filed an Equal Employment Office ("EEO") complaint (EEOC No. 340- A1-3604X), alleging discrimination based upon race, sex and color, and retaliation. Compl. at 2, ¶ 4. The EEO complaint was subsequently changed to a class action, and the Administrative Law Judge ("All") reviewing the case denied certification of the class on September 1, 2004. Mot. Ex. 1. Plaintiff wrote a response to the ALJ on September 3, 2004. Mot. Ex. 2. The decision was made final on October 13, 2004. Opp. Ex. Unmarked.

A. Class Claims

In 1999, federal regulations authorized agencies to conduct "demonstration projects that experiment with new and different personnel management concepts." Compl. at 3,1 11; see also Office of Personnel Management's "Notice of approval of a demonstration project final place," 64 F.R. 1426, 1999 WL 4662 (Jan. 8, 1999). Edwards implemented the Acquisition Demonstration Project in 1999. Compl. at 3, ¶ 11. Although the intent of the program was to provide managers

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'The following facts taken from the Complaint are assumed true for purposes of this motion only.

with greater flexibility in assigning duties to their employees, the result, according to Plaintiff, was subjective implementation of the program, with fewer minorities receiving awards and rating increases, affirmative action goals ignored, and no monitoring for compliance with other civil service laws. Compl. at 4, 11I 12-15. Plaintiff alleges that Edwards intentionally created a "restricted policy" for hiring that excludes minority groups. Compl. at 5, ¶ 17-20. According to Plaintiff, Edwards uses incorrect numbers in reporting compliance with an affirmative action employment plan. Compl. at 5-6, 11 21-22. Further, Plaintiff alleges that Edwards does not adhere to a Federal Equal Opportunity Recruitment Program because it fails to actively recruit minorities (Compl. at 6, ¶ 23), and that Edwards inaccurately determines whether there is under-representation in its minority recruitment (Id. 1124-25). Plaintiff alleges that many actions taken by Edwards have affected minorities over the age of 40, who have had to train younger white workers or see

younger white workers promoted over them, despite minority workers' longer service. Compl. at 7, ¶ 26. Finally, Plaintiff alleges that the majority of the class has filed EEO complaints and faced reprisals for their actions. Id. if 27.

Based on these assertions, and after agreeing that she may not bring claims under 42 U.S.C. § 1981 or under FEHA (Opp. at 6-7), Plaintiff has six remaining "class claims": (1) the class was treated differently than comparable white employees, a situation which "created both disparate treatment and disparate impact on the class," and was retaliated against for protected activities, in violation of Title VII (Compl. at 7-9, 11 27, 39-41); (2) Edwards failed to "set up an environment of compliance with" Air Force Test Center Instruction 36-6, which requires that EEO principles be integrated into the personnel management process and considered in employment decisions (Compl. at 9-10, f,lf 45-47); (3) Edwards failed to comply with Air Force Regulation 40-713 to eliminate racial barriers

regarding promotion and advancement (Compl. at 10, ¶ 50); (4) Edwards failed to recruit minorities in many positions in violation of 5 U.S.C. § 2301(b)(1) (Compl. at 10, 11 51-53); (5) Edwards obstructed the class from competing for employment by controlling employment of minorities through the Acquisition Demonstration Program in violation of 5 U.S.C. § 2302(b) (Compl. at 11, 117 5456); and (6) Edwards' employment policies and practices created adverse impact on the hiring and promotion of the class members in violation of Uniform Guidelines on Employee Selection Procedures § 1607.3 (Compl. at 11, 11 57-59).

As to these class claims, Plaintiff seeks an award of $400 million in compensatory and punitive damages, back pay, front pay, lost benefits, attorneys' fees, and injunctive relief. Compl. at 12-13.

B. Individual Claims

Plaintiff alleges that her individual claims are "similar" to her class allegations. Compl. at 14, ¶ I. Plaintiff alleges she did not receive

training for her position for many months, and that an unspecified coworker was paid more, though they held the same positions.' Compl. at 14, ¶ 2.

III. LEGAL STANDARD

A complaint is dismissed under Rule 12(b)(6) only if it lacks "a cognizable legal theory" or if there is an "absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699

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[2]Some confusion between the parties was created by the inclusion in the Complaint of a heading labeled "Individual Claims — Other Class Members," and a spreadsheet purporting to identify those claims. Compl. at 14, 16-17. Briefing has made clear that this section of the Complaint was intended to give examples of former employees

(9th Cir. 1990). In deciding a Rule 12(b)(6) motion, the court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations as true, as well as any reasonable inferences drawn from, them. Broam v. Brogan, 320 F.3d 1023, 1028 (9th Cir. 2003). "A complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts that would" merit relief. Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1229 (9th Cir. 2004). In deciding motions to dismiss, the court is limited to considering material on the face of the complaint or its properly submitted attachments. Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001); Campanelli v. Bocicrath, 100 F.3d 1476, 1479 (9th Cir. 1996).

Plaintiff sought to include in the class claims: she was not, as Defendant originally *believed*,

Allegations in a complaint filed pro se are held to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). "[Piro se pleadings are liberally construed, particularly where civil rights claims are involved." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

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attempting to assert individual claims on their behalf. Opp. at 11.

IV. DISCUSSION

A. Plaintiff's Individual Claims

The court turns first to Plaintiff's individual claims, in order to determine whether she is able to state a claim such that she could serve as the class representative. See East Texas Motor Freight System. Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) ("As this Court has repeatedly held, a class representative must be part of the class..."); Fed. R. Civ. P. 23(a) ("the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class").

1. Waiver

When the AU *denied* Plaintiff's motion for class certification, he stated that Plaintiff was "allowed to proceed with his [sic] individual complaints of discrimination."' Mot. Ex. 1, at 6. The ALJ further stated that if the "Complainant seeks to appeal the instant Decision denying class certification then. [the class claims are dismissed] without prejudice to the Complainant's [sic] to

each renew their intent to proceed on their individual complaints within thirty (30) days after of [sic] the receipt of the appeals decision." Mot. Ex. 1 at 23 (emphasis omitted).

The ALJ order then instructed Plaintiff to submit a letter to specified persons "confirming his/her intent to proceed on their individual complaints." Id. Plaintiff's response was to state unequivocally that she intended to pursue only her class claims: "The class agent is stating for the record that her case will not proceed to a hearing as an individual ... The class complaint will be vigorously appealed." Mot. Ex. 2, at 2 (emphasis in original).

The Sept. 1, 2004, ALT Order disposed of the consolidated putative class complaints of Plaintiff and her husband, Leonard

Consistent with her statement of intent, she failed to submit any letter indicating an intent to pursue her individual claims. Through her own statement, and her inaction, Plaintiff effectively waived her right to pursue her individual claims in federal court.

The court construes the language of EEOC charges "with utmost liberality since they are made by those unschooled in the technicalities of formal pleading." B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1100 (9th Cir. 2002). It follows that the court should construe the language of correspondence by complainants in the course of EEOC proceedings with the utmost liberality as well. Plaintiff attempts to explain that her intention was to inform the ALJ that she vigorously protested the denial of class certification, and that she wished to appeal his decision instead of having a hearing on her individual claims. Opp. at 6.

However, even reading Plaintiff's statement "with utmost liberality," the statement admits of only one conclusion, viz., that Plaintiff did not

intend to pursue her individual claims. Plaintiff made her statement expressly "for the record," stating unequivocally that "her case will not proceed to a hearing as an individual." Mot. Ex. 2, at 2. There was no ambiguity in Plaintiff's expression of how she intended to proceed. Furthermore, she was given clear instructions on how to proceed as to her individual claims, and she ignored them. She never sent the required letter, nor did she make any other effort to pursue her individual claims after the ALJ decision or the final notice. Accordingly, in both word and deed, Plaintiff evinced a clear intent to waive her individual claims.

Moreover, even absent the waiver, Plaintiff fails to state a claim under any legal theory.'

'Plaintiff concedes that as a former federal employee she may not bring a claim against her former employer under 42 U.S.C. § 19S1 or under FEHA. Opp. at 6-7. Accordingly, those claims are dismissed.

1. Title VII Claims

Plaintiff asserts a cause of action under Title VII for race-based discrimination. She also alleges that "the majority of the class," presumably including her, have been subject to retaliation for filing EEO complaints (Compl. at 7, ¶ 27); such retaliation is also a violation of Title VII. 42 U.S.C. § 2000e-3(a). A federal employee seeking review of the disposition of an administrative complaint for race-based discrimination in the federal courts is required to see the administrative process through until she receives a notice of final action. See Farrell v. Principi, 366 F.3d 1066, 1067 (9th Cir. 2004) (citing 42 U.S.C. § 2000e-16(c)). Plaintiff has received notice of final action only on the disposition of the class discrimination complaint (see Repl. Ex., Unmarked), but has not seen her individual claims through to the same extent.

Plaintiff has not exhausted the administrative remedies available to her for her individual claims as required by Title VII.

Administrative proceedings must be concluded for there to be "final action" within the meaning of 42 U.S.C. § 2000e-16. Cosgrove v. Bolger, 775 F.2d 1078, 1080 (9th Cir. 1985). Here there was no conclusion of administrative proceedings — and thus no final action — as to Plaintiff's individual claims, because she never pursued them through the administrative process. "When a federal employee ... abandons [the administrative] process to pursue a remedy elsewhere, he fails to exhaust his chosen remedy and thereby forecloses judicial review." Vinieratos v. United States Dept. of Air Force, 939 F.2d 762,772 (9th Cir. 1991). Having declined to pursue her individual claims through the administrative process, Plaintiff may not now invoke the jurisdiction of this court under Title VII.

2. Claims Under 5 U.S.C. §§ 2301, 2302

Plaintiff alleges violations of 5 U.S.C. § 2301(b)(1) ("Merit System Principles") and 5 U.S.C. § 2302(b) ("Prohibited Personnel

Practices"). Both are part of the Civil Service Reform Act ("CSRA"), which "is a detailed, comprehensive effort to regulate employee-management relations in the federal government." Schrachta v. Curtis, 752 F.2d 1257, 1259 (7th Cir. 1985). No private right of action is provided by the CSRA, and a host of federal courts have considered and rejected the proposition that the CSRA provides an implied private right of action. See United States v. Fausto, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988); Hastings v. F.A.A., 187 F.3d 938, 940 (8th Cir. 1999) Ryon v. O'Neill, 894 F.2d 199, 203 (6th Cir.1990); Philii s v. General Services Admin., 917 F.2d 1297, 1298 (Fed. Cir. 1990); Tavdus v. Cisneros, 902 F Supp. 238, 292 (D.Mass.1995) (collecting cases); Veit v. Heckler, 746 F.2d 508, 509 (9th Cir. 1984); Carducci v. Regan, 714 F.2d 171, 172 (D.C.Cir. 1983); Braun v. U.S, 707 F.2d 922, 925 (6th Cir. 1983); Carter v. Kurzejeski, 706 F.2d 835, 840-43 (8th Cir. 1983); Cutts v. Fowler, 692 F.2d 138, 140 (D.C. Cir. 1982).

These courts have uniformly held that Congress intended the remedies provided by the CSRA to be the exclusive means to remedy violations of the Act. For instance, the merit systems principles can be used to interpret a law, rule, or regulation asserted to be violated by a government agency personnel practice, but they do not in themselves give Plaintiff a cause of action. Phillips, 917 F.2d at 1298. Accordingly, Plaintiff cannot state a claim under either provision.

3. Violations of Various Regulations

Plaintiff has also filed claims based on alleged violations Air Force Flight Test Center Instruction 36-6, Air Force Regulation 40-713, and Uniform Guidelines on Employee Selection Procedures § 1607.3. While violations of an affirmative action plan or other regulation may constitute evidence of discrimination in certain cases, such violations do not in and of themselves give rise to private causes of action. See Gonzalez v. Police Dept., City of San Jose, Calif. 901 F.2d

758, 761 (9th Cir. 1990). Accordingly, Plaintiff's claims under these regulations must also be dismissed.

4. Age Discrimination

Plaintiff alleges age discrimination in her Complaint, but does not list violation of the Age Discrimination in Employment Act ("ADEA") under the causes of action upon which she has filed suit. Compl. at 7, I; 26. Because of the less stringent standard applied to pro se pleadings, and because a complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts that would merit relief, the court considers whether Plaintiff is able to state a claim for age discrimination, i.e., violation of the ADEA .Unlike claims made under Title VII, a plaintiff need not exhaust her administrative remedies prior to filing a civil suit for violation of the ADEA. Bankston v. White, 345 F.3d 768, 775-77 (9th Cir. 2003). The only procedural requirement is that a plaintiff notify

the Equal Employment Opportunity Commission ("EEOC") at least 30 days prior to filing suit and within 180 days of the alleged unlawful occurrence. 29 U.S.C. § 633a(d). Plaintiff does not claim to have given the EEOC such notice. Furthermore, Plaintiff retired from her employment in May 2001; any notification now would be time-barred. Accordingly, Plaintiff cannot meet the requirements of § 633a(d), and is therefore unable to state a claim for violation of the ADEA.

B. Class Action Claims

As set forth above, Plaintiff has waived her right to pursue her individual claims in federal court, and, in any event, fails to state a claim upon which relief may be granted. Accordingly, Plaintiff may not act as the class representative for a class action suit based on these claims. The class action claims must therefore be dismissed.

Additionally, the class claims must be dismissed because a class representative cannot appear pro se. Class action suits are representative suits brought on behalf of groups

of persons who are similarly situated but who may or may not be parties to the suit. Class members who are not parties to a class action suit nevertheless are bound by the judgment in the suit, and due process is satisfied, if the absent members' interests are adequately represented by the class members who are present. Crawford v. Honig, 37 F.3d 485, 487 (9th *Cir.* 1994), as amended *Jan. 6, 1995.* "Adequate representation as required by Federal Rules of Civil Procedure Rule 23(a)(4) depends [inter alia] on the qualifications of counsel for the representatives ." Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390 (9th Cir.1992) (citation omitted), cert. dismissed, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994).

Under Rule 23(a)(4), a class representative must "fairly and adequately protect the interests of the class." Although the Ninth Circuit has no precedent directly on point, every court to have examined the issue agrees that a class representative appearing pro se lacks the ability to adequately protect the interests of the class. See, e.g., 7A Wright, Miller, & Kayne, Federal Practice and Procedure §

1769.1, n. 13 (ed. 2005) (collecting cases for rule that "class representatives cannot appear pro se"); see also Fymbo v. State Farm Fire and Cas. Co., 213 F.3d 1320, 1321 (10th Cir. 2000) ("a litigant may bring his own claims to federal court without counsel, but not the claims of others"). This is because the competence of a layman is "clearly too limited to allow him to risk the rights of others." Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975).

Here Plaintiff claims to be "actively pursuing counsel for this case," and requests that the court either grant a continuance or appoint interim counsel. Repl. at 5. Because this case was filed over a year ago, giving Plaintiff more than enough time to secure counsel, the court finds that granting a continuance would be futile. Moreover, "[t]here is normally ... no constitutional right to counsel in a civil case." U.S. v. 30.64 Acres of Land. More or Less. Situated in Klickitat County. State of Wash., 795 F.2d 796, 801 (9th Cir. 1986) (citing Lassiter v. Dept. of Social Services, 452 U.S. 18, 25-27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)); see also Aldabe v.

Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980) (noting power to appoint counsel to represent indigent civil litigants is limited to, "exceptional circumstances"). No exceptional circumstances exist in this case that would warrant the appointment of counsel, and the court declines to take such action.

Accordingly, even if Plaintiff were able to state a claim upon which relief could be granted as to her individual claims, the court would be compelled to dismiss the class claims.

V. CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss is GRANTED. IT IS SO ORDERED.

DATED: October 27, 2005

/s/

Nora M. Manella

United States District Judge

Case 05-56816 01/26/2009 Page 1 of 4 DktEntry: 6783526

FILED
JAN 28, 2009
MOLLY C. DWYER, CLERK

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERGIE H. WHITE,	) No. – 05-56816
	) D.C. No. CV-04-
	)09364-NM
Plaintiff – Appellant,	)
	) MEMORANDUM*
v	)
	)
PETE GEREN, Acting Secretary of the United States Air Force,	)
Defendant – Appellee	)

Appeal from the United States District Court
For the Central District of California
Nora M. Manella, District Court Judge, Presiding

Submitted January 13, 2009**

Before: O'SCANNLAIN, BYBEE, AND CALLAHAN, Circuit Judges

Vergie H. White appeals pro se from the district court's order dismissing her action alleging race discrimination against minority employees at Edwards Air Force Base

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*This disposition is not appropriate from publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2)

We have jurisdiction under 28 U.S.C. Section 1291. We review de novo an order dismissing for for failure to state a claim. *Ortez v Washington County,* 88 F.3d 804, 807 (9th cir. 1996). We affirm.

The district court properly dismissed White's Title claim because White did not fully exhaust her administrative remedies. See *Jasch v Potter,* 302 F.3d 1092, 1094 (9th Cir. 2002)("In order to bring a Title VII cause of action against a federal government agency in district court, [plaintiff] must first exhaust his administrative remedies.")

The district court properly dismissed White's class action claims because White, proceeding pro se, was not an adequate class representative. *See* Fed. R. Civ. P. 23(a)(4) (requiring that class representative be able

To "fairly and adequately protect the interests of the class"); *McShane v United States,* 366 F. 2d 286, 288 (9th Cir. 1966) (holding that a lay person lacks authority to appear as an attorney for others.)

White's remaining contentions are unpersuasive.

AFFIRMED.

/Research

Case 05-56816 04/20/2009 Page 1 of 2 DktEntry: 688025

FILED
JAN 28, 2009
MOLLY C. DWYER, CLERK

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERGIE H. WHITE,	) No. – 05-56816
	) D.C. No. CV-04-
	)09364-NM
Plaintiff – Appellant,	) Central District
	) of California
v	)
	) ORDER
PETE GEREN, Acting	)
Secretary of the United	)
States Air Force,	)
Defendant – Appellee	)

Before: O'SCANNLAIN, BYBEE, AND CALLAHAN, Circuit Judges

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for

rehearing en banc and not judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed case.

Vincent White

From : XXXXXX (Name withheld due to privacy)

To: vinelv@qnet.com

Cc: XXXXXX

Sent: Monday, September 01, 2008

Subject: Info

Hi. Sir,

My name is XXXX, a friend of XXXXX. Employed at Edwards Air Force Base. I am in the same predicament, and was told by XXXX to contact you.

I can be reached at:

XXXXXX

Email:

Anything that you can do for me will be appreciated.

Thank you.

NONCLASS

MEMBER

Vincent White

From : XXXXXX (Name withheld due to privacy)

To: vinelv@qnet.com

Cc: XXXXXX

Sent: Tuesday, March 31, 2009 9:02 a.m.

Subject: Info

I need a good lawyer they are pass me over again. I need a good one that going answer me right back thank

XXXXX

Fax Number Commercial (661) 277- XXXX

Fax DSN 527-5918

The truth is that he who angers you controls you.

CLASS

MEMBER

The date of the EEO list is 1 Jan 2003, but the list is inaccurate. List is available upon request. Petitioner could not format the list to meet the requirements of the Supreme Court. There are individuals that should not be on the list or other reason as indicated below:

Name		*Reason Why List Is Not Accurate*
1.	F. Altum	Retired – 2001, White
2.	A. Antoine	Listed as White, Is Hispanic
3.	E. Bingham	Retired 2000 – Black
4.	B. Blume	Retired – 2001 – White
5.	D. Caasi	Listed as White – Is Asian
6.	G. Campos	Retired 2001 – Hispanic
7.	N. Cody	Left 2002 – White
8.	L. Collins	Retired 2002 – White
9.	J. Davidson	Retired 2000 – White
10.	D. Delany	Left 2001 – White

11.	E. Deveaux	Left 2002 – Black
12.	K. Elquist	Left 2002 – White
13.	E. Emery	Retired 2001 – White
14.	C. Gillespie	Left 2002 – White
15.	J. Goodwin	Left 2002 – White
16.	C. Hicks	Left 2002 – Black
17.	T. Hughes	Listed as White – Is Black
18.	C. Johnson	Left 2000 – White
19.	M. Kaiser	Left 2001 – White
20.	S. Keuper	Left 2002 – White
21.	M. Kilpatrick	Left 2002 – Black
22.	M. King	Retired – 2001 – White
23.	K. Mayo	Died – 1999· White
24.	R. Newman	Listed as White – Is Hispanic
25.	C. Odebralski	Left· Transferred White
26.	J. O'Donnell	Died – 1999/2000? White
27.	J. Petalver	Listed As White – Is Asian
28.	D. Reed	Left 2002 – White

29.	D. Reyes	Left 2002 – White
30.	L. Rodgers	Retired · 2001
31.	J. Rodriguez	Left – Transferred
32.	I. Scott	Retired 1999 – White
33.	M. Smith	Left 2002 – Hispanic
34.	S. Tampon	Left 2001 – Asian Not White
35.	B. Thim	Retired 2002 · White
36.	G. Townsley	Retired 2001 – White
37.	D. Wadsworth	Left · 2002 White
38.	J. Watson	Left – 2000 White
39.	L. White Sr.	Retired – 2001 – Black
40.	Vergie White	Retired – 2001 – Black
41.	M. Williams	Retired – 2000· Black

DEPARTMENT OF THE AIR FORCE

Washington, DC 20330

Office Of The General Counsel

Vergie White
PO Box 295
Edwards, CA 93523
Class Agent

And

James G. Roche, Secretary,
Department of the Air Force,
Agency

Agency Docket No. EB1M-01001
EEOC No. 340-A1-3604X

FINAL ORDER

On September 1, 2004, the Equal Employment Opportunity Commission (EEOC) issued an order dismissing the above-captioned class discrimination complaint; the order was received by the Air Force on September 7, 2004. This document sets forth,

pursuant to 29 C.F.R. Section 1614.204(d)(7), the final agency action in this complaint.

The relevant EEOC regulations require an agency to take final action on a complaint by issuing a final order within forty days of receipt of the hearing file and the Administrative Judge's decision. The final order must inform the class agent whether or not the agency will fully implement the decision of the Administrative Judge. If the final order does not fully implement the decision of the Administrative Judge, then the agency must simultaneously file an appeal and provide notice of the appeal in the final order. The final order must inform the class agent of the right to appeal the dismissal of the class complaint to the EEOC or to file a civil action and shall include EEOC Form 573, Notice of Appeal/Petition. See generally 29 C.F.R. § 1614.204(d)(7).

The Administrative Judge dismissed the complaint as a class complaint, concluding that the "proposed class claim does not meet the requirements of numerosity, commonality, typicality, and adequacy of representation." The Administrative Judge further concluded that the "claim must be rejected and Complainant allowed to proceed with his individual complaints of discrimination."

White v. Roche, Administrative Judge's Decision, September 1, 2004, at pg 7.

After our independent review, the Air Force has determined that it will fully implement the decision of the Administrative Judge that dismissed this complaint.

RIGHT TO APPEAL

This final agency action may be appealed to the Equal Employment Opportunity Commission within

30 days of receipt. As provided in 29 C.F.R. § 1614.402, for complainants represented by an attorney of record, the 30-day time period within which to appeal shall be calculated from the receipt of this decision by the attorney. In all other instances, the time within which to appeal shall be calculated from the complainant's receipt of this decision.

29 C.F.R. § 1614.604 provides:

(b) A document shall be deemed timely if it is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in

which case the period shall be extended to include the next business day.

Appeals must be filed by mail to Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036, or by personal delivery or facsimile at 202-663-7022. The appellant should use EEOC Form 573, Notice of Appeal/Petition and should indicate what is being appealed.

Facsimile transmission over 10 pages will not be accepted. The appellant shall furnish a copy of the appeal to the opposing party at the saine time it is ifled with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party. 29 C.F.R. § 1614.403(b). Any statement or brief in support of the complainant's appeal must be submitted to the Commission with one

copy to the Air Force at AFLSA/CLLO, 1501 Wilson Blvd., 7ht Floor, Arlington, VA 22209 within 30 days of filing the Notice of Appeal.

Further guidance regarding appeals may be found at 29 C.F.R. § 1614.401 et seg. and Chapter 10 of the Commission's Management Directive-110. These documents are available at the EEOC's Web site at www.eeoc.gov.

RIGHT TO FILE CIVIL ACTION

If the complainant wishes to file a civil action, pursuant to 29 C.F.R. § 1614.407, the complainant may be authorized under Title VII, ADEA, or the Rehabilitation Act to file such action in an appropriate United States District to file such action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final action on an individual or class complaint if no no appeal [to the Commission] has been filed;

(b) After 180 days from the date of filing an

individual or class complaint if an appeal has not been filed and final action has not been taken

(c) Within 90 days of receipt of the Commission's final decision on appeal

(d) After 180 days from the date of filing an appeal with the Commission if there have there has been no final decision by the Commission.

If a civil action is filed, the appropriate Department or Agency head must be named as the defendant. Failure to state the NAME AND OFFICIAL TITLE of the person who is the Agency head may result in the dismissal of a case. The head of the Department of the Air Force is the Honorable James G. Roche, Secretary of the Air Force. Filing a civil action will terminate Commission processing of an administrative complaint.

If the complainant decides to file a civil action under Title VII or under the Rehabilitation Act, and

if the complainant does not have or cannot afford the services of an attorney, the complainant may request that the court appoint an attorney to represent the complainant and that the court permit the complainant to file the action without payment of fees, costs, or other security.

The grant or denial of the request is within the sole discretion of the court. Filing a request for an attorney does not extend the time in which to file civil action. Both the request and the civil action must be filed within the applicable time limit.

13 Oct 2004

/s/

Don W. Fox
Deputy General Counsel
(Fiscal and Administrative Law)

Agency Docket No. EB1M-01001
EEOC No. 340-A1-3604X

Attachment
EEOC Form 573

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be deposited in the United States mail (certified, return receipt requested) a copy of the foregoing FINAL ORDER addressed to the following individuals at the following address:

Vincent White
2603 West Oldfield Street
Lancaster, CA 93536

Vergie White
PO Box 295
Edwards, CA 93523

Vergie White
45455 Third Street East
Lancaster, CA 93535

Leonard White
45455 Third Street East
Lancaster, CA 93535

I hereby certify that I have caused to be deposited in the United States mail a copy of the foregoing FINAL ORDER to:

Mary P. Pablo
AFFTC/CCD, EEO Office
307 E. Popson Avenue
Building 1400, Wing C, Room 423
Edwards AFB, CA 93524-6630

Michael Z. Salvador
Administrative Judge
U.S. Equal Employment Opportunity Commission
San Diego Area Office
401 B. Street, Fifth Floor, Suite 1550
Los Angeles, CA 92101

This 13th day of October, 2004

/s/
JACQUELINE A. HOUSE
ASSOCIATE GENERAL COUNSEL

YOUNG K. LAI, M.D., F.A.C.O.G.

GYNECOLOGY

A MEDICAL CORPORATION

43860 10th STREET WEST. SUITE 204 • LANCASTER. CALIFORNIA 93534

(661) 948-1685

November 28, 2005

To Whom It Concerns:

This is to certify that Virgie White is currently under my care and has been since February of 1999.

She continues with follow up care every three months. Mrs. White had cancer surgery on February 11, 2004.

If you have any questions regarding this matter, please phone this office.

Sincerely

/S/

Young K. Lai, M.D.

Nitin A Shah, MD, F.A.C.S., Inc.
F A. A.O.S. - F.I.C.S.. QUALFIED MEDICAL EVALUATOR. (QME). STATE CF CALIFORNIA

May 19.2005

U.S. Department of Labor
Worker's Compensation Division
PO Box 8300, Mailroom 13
London, KY 40742-8300

Re: White, Vergie
Date of Exam: 5/18/05
Date of Injury: 06/20/00
EMP: Edwards Air Force Base Civil Services

The patient was re- evaluated today for the industrial injury to the low back region. The patient has generalized pain with difficulty in walking and getting around. He has discomfort and weakness of the upper extremities also. The patient is requesting a prescription and provision of a powered wheelchair. I advised the patient I would contact your office.

In my judgment, such a wheelchair would be of significant help to this individual.

A follow-up appointment in one month was given.

DECLARATION

In compliance with recent Worker's Compensation legislation [Libor Code Section 4628 (j) and 5703 (a) (2)1 and Insurance Code *Section* 556: I declare under penalty of perjury that I have not violated Labor Code Section 139.3 and that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others.

As to that information, I *declare under* penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true. Furthermore, this evaluation is in compliance with the guidelines established by the Industrial Medical

Council or Administrative Director pursuant to paragraph (5) subdivision (I) of Labor Code Section 139.2 or 5307.6.

Signed by me in the County of Los Angeles this 23nd day of May 2005

/s/

Nitin A. Shah, M.D.
F.A.C.S., F.I.C.S., F.A.A.O.S.
Diplomats, American Board of Orthopaedic Surgery
QUALIFIED MEDICAL EVALUATOR (QME). STATE OF CALIFORNIA
California License Number A33933
it AS: km
DT: 05/19/05-05/20/05
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